

SOME UNWISE REFLECTIONS ABOUT DISCRETION

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In listening to discussions about discretion in the criminal process, one has the sense of sharply cut distinctions slipping toward a black hole in our language. All decisions by police, prosecutors, judges and jury are routinely called discretionary. This usage pervades respectable, basically sound papers. In a recent article in the *Yale Law Journal*,¹ Goldstein and Marcus seek to demonstrate that discretion pervades the decisions of French, German and Italian prosecutors. They write: "Claims that prosecutorial discretion has been eliminated, or is supervised closely, are exaggerated. Discretion is exercised in each of the systems [French, German and Italian] for reasons similar to those supporting it in the United States."²

In an article appearing in this volume,³ Richard Uviller relates an interchange with police officers. When the officers were uncertain about believing a complaining witness, Uviller impressed upon them that they had "discretion" whether to credit and rely upon the witness's report.⁴ Presumably, the officers would not have used that word to describe their decisional situation.

Goldstein and Marcus tell continental prosecutors that there is a feature of their decisional situation that they are inclined to deny.⁵ Uviller tells police officers that there is a feature of their role and function of which they are unaware. What happens, exactly, when we as observers of the criminal process begin to describe a decision as discretionary? Do we say something perceptive and accurate about the state of the world? Or is it simply that we impose upon the world a mode of description that we find reassuring? I confess total bewilderment about these issues and therefore I shall offer some admittedly unwise reflections in an effort to find a way out of this confusion.

I suggest that we suspend judgment for a moment about whether the concept of discretion is an appropriate way to capture the reality of decisions made in the processes of arrest, prosecution and trial. Let us go back to the

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1. Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977).

2. *Id.* at 280.

3. Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, LAW & CONTEMP. PROBS., Autumn 1984, at 15.

4. *Id.* at 27-29.

5. Goldstein & Marcus, *supra* note 1, at 270 (referring to "repeated affirmations of adherence to the norm of compulsory prosecution").

habitat that nourished the concept of discretion and made it right for transplanting into our descriptions of how legal officials behave.

I

HOW OTHERS TALK ABOUT DISCRETION: NORMAL PEOPLE

The standard books of famous quotations yield a list of well-known maxims about discretion. Shakespeare teaches us that "The better part of valor is discretion,"⁶ and John Selden, the lawyer, is remembered for saying that "Philosophy is nothing but discretion."⁷ In these and other well-worn expressions, discretion carries the meaning of "discernment" or "judgment," as suggested by its Latin root *discernere*. Yet this is obviously not the meaning that Uviller had in mind when he told the officers that they had discretion to accept or reject the witness's view of the facts. It would have been insulting to tell a police officer that he was now "of the age of discretion." The point that Uviller sought to make had nothing to do with wisdom and understanding, but presumably with power—with the capacity of the police officer to act as an independent agent.⁸

There are, admittedly, many instances in the law in which we speak of exercising discretion, and have in mind a sound judgment required to mold an array of legal authorities into the solution of a particular dispute. Perhaps Goldstein and Marcus have this sense in mind when they say that the interpretation of statutes requires discretion.⁹ Of course, this is not an attribute that any German or Italian prosecutor would deny. Everyone is flattered to be regarded as a person of sound judgment.

Those who claim that discretion is inherent and inescapable in every facet of the legal process would hardly settle for the interpretation of discretion as "discernment" or "good judgment." They have in mind something stronger—precisely as did Uviller when he tried to convince the police officers that they enjoyed decisional autonomy.

Two senses of discretion interweave in this discussion. Discretion as sound judgment merges with discretion as decisional autonomy. To appreciate the distinction between these two senses, note the usage of particular verbs associated with each sense. Contrast (1) "exercise" discretion, with (2) "have" discretion, and (3) "grant" or "be granted" discretion. The first two verbs, "exercise" and "have" are ambiguous. They could point either to

6. Shakespeare, *Henry IV*, V, iv, 117-18.

7. J. SELDEN, *TABLE TALK* 93 (F. Pollock ed. 1927).

8. It is significant that German sociologists do not use the German term *Erkennen* (discretion) to refer to "police discretion." Instead they use the term *Definitionsmacht* (power of definition) to refer to decisions on the street that shape the enforcement of the criminal law. See the authorities cited in Linnan, *Police Discretion in a Continental European Administrative State: The Police of Baden-Württemberg in the Federal Republic of Germany*, *LAW & CONTEMP. PROBS.*, Autumn 1984, at 185, 189, nn.11-13; J. FEEST & E. BLANKENBURG, *DIE DEFINITIONSMACHT DER POLIZEI: STRATEGIEN DER STRAFVERFOLGUNG UND SOZIALE SELEKTION* (1972).

9. Goldstein & Marcus, *supra* note 1, at 280 ("However much Continental writers describe their criminal statutes as narrowly drawn, the codes are sufficiently general to make it necessary for prosecutors to interpret fact and law.").

the capacity for a sound judgment, as memorialized in literary maxims, or they could underscore some quality of power or authority that enables the decisionmaker to act relatively freely, autonomously or creatively. The phrase "grant discretion" appears, however, to point only in the direction of the latter sense in which even undiscerning decisionmakers exercise formal discretion. If the decisionmaker is granted the authority to disburse funds, to plan a highway or to choose the casebook for a course, then however intelligent or unwise he might be, he acquires a limited zone of decisional sovereignty. This latter sense requires us to examine the special way in which lawyers talk about discretion.

II

HOW OTHERS TALK ABOUT DISCRETION: LAWYERS

Within the language of the law, there is a point in describing decision-making as discretionary. Important consequences follow. If a trial judge has discretion, as he does in determining the order in which the parties present proof, in controlling the scope of rebuttal testimony, in limiting the number of expert witnesses and in making numerous other managerial decisions, he is subject to far less appellate supervision than when he renders decisions of law. An exercise of discretion is subject to reversal only if the discretion is abused. The notion of abuse here implies a range of normal practice. Only if the decision is an extreme departure from the norm of good trial management will the judge be reversed on appeal. I stress the element of trial management, for my hunch is that these decisions that are denominated "discretionary" in the law typically pertain to the administration of the institution, rather than to the resolution of conflicting claims on the merits.

The focus of the discretionary decisionmaker is on the institution that he or she is managing. The goal of efficiency guides the inquiry. To take the example of the trial, the judge orders the presentation of proof in order to structure the inquiry in the most expeditious manner possible.¹⁰ From this description of the matter, it follows that the parties do not have a basis for claiming a right to any particular decision by the judge. Of course, they can expect that the judge will consider their interests as well as his own convenience and the public's interests in the efficient administration of justice. In an extreme case, the judge may go too far in ignoring the interests of one of the litigants. In that event, it might be appropriate to label the decision "an abuse of discretion."¹¹ Another way of stating the same point is that the parties

10. See *Geders v. United States*, 425 U.S. 80, 86-87 (1976) (discussing role of judge as "governor of the trial" whose determinations can be overruled only for "abuse of discretion," in holding that sequestering the defendant from counsel during an overnight recess violated the defendant's right to assistance by counsel).

11. *E.g.*, *Nelson v. United States*, 415 F.2d 483, 485 (5th Cir. 1969) (decision to proceed in one trial against multiple defendants reversed only after "a clear showing of abuse of discretion"); *Goldsby v. United States*, 160 U.S. 70, 72-73 (1895) (failure to grant continuance and to grant request to call witnesses reviewable in Supreme Court only for abuse of discretion).

have a right to have their interests considered, at least to the point of this minimal threshold.

Discretionary decisionmaking is a common feature of institutional life. An investment counselor exercises discretion in deciding where to commit his client's funds. University teachers exercise discretion in choosing materials for their courses and in making other pedagogical decisions. It follows from the description of these decisions as discretionary that neither the counselor's clients nor the teacher's students have a right to a decision of any particular cast. It is obvious, however, that they do have a right to a particular process—that the decisionmaker attend to their interests in exercising his discretion. They are the beneficiaries of his expertise (if he has any), rather than right-bearers with claims to particular outcomes.

Much the same point applies to describing criminal sentencing as discretionary. The critical feature elicited by this description is not so much the permissible range of the sentence, but the implicit objective of sentencing within a wide framework. The purpose of the discretionary scheme might be deterrence or rehabilitation. We would not likely describe the defendant subject to discretionary sentencing as having a right to any particular sentence. To say that he had a right to precisely that sentence that fits his crime, or corresponds to the degree of his desert, would belie implicit assumptions of the discretionary sentencing.

Consider briefly the implications of describing *all* legal decisions as discretionary. It would, I suppose, be implicit in this description that we thought of judges as having particular wisdom or discernment in interpreting the law. Moreover, we would allow them the same latitude in managing the legal system that we do in respecting their managerial decisions about conducting the trial. It would follow, also, that litigants would have no rights within this range of normal legal interpretation. A right to recover damages in tort law would have no more secure foundation than a right to a continuance of the trial date. This way of speaking about the law—bringing it into alignment with our formal mode of ascribing discretion—violates basic assumptions of the legal system.

This is not to say that the view of, say, tort law as an institution to be managed in the same way that the trial is managed, would appear absurd to all observers. Some people think of the tort system precisely as an institution for spreading risks or minimizing accident costs.¹² Insofar as what is at stake is a complex mechanism of insurance or of social engineering, it is not absurd to describe all matters of interpretation as managerial and discretionary in nature. It is not inconceivable that judges manage the tort system in the same way that they distribute criminal sanctions, namely to achieve the highest net overall benefit to society. To speak in this way, however, is to deny that the litigants derive rights and duties from the incident at the core of the dispute.

It is not surprising then that Ronald Dworkin has stressed this centrality of

12. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* 24-67 (1970).

rights in his repeated attack on the widespread view that discretion pervades legal decisionmaking.¹³ The existence of rights is necessary to eliminate discretion from particular decisional contexts.¹⁴ That is, as I have argued here, confidence that the purpose of the legal system is to protect rights under law proves to be a sufficient basis for distinguishing decisions about the law from the managerial decisions that we call discretionary.

III

HOW WE TALK ABOUT DISCRETION: OBSERVERS OF THE LEGAL PROCESS

The preceding sections outline two senses of discretion that Dworkin labels, respectively, weak and strong.¹⁵ The weak sense is suggested by the traditional and common definition of discretion as "good judgment."¹⁶ The strong sense is based on the notion of discretion's being "granted" to a decisionmaker.

When observers of the legal process claim that discretion is inherent and inescapable at every turn, my hunch is that they have something different in mind from either the weak or the strong sense of the term. The following is an account of what seems to be at stake. The modern, ubiquitous use of the term "discretion" in jurisprudential discussion seems to be a response to a view captured by the epithet "mechanical decisionmaking."¹⁷ The notion of the mechanical in applying the law is captured by Montesquieu's maxim that the judge is nothing more than "the mouth of the law."¹⁸ The latter position suggests that somehow the law itself generates a human decision. The lack of human input is expressed by calling the decision "mechanical"; the decisionmaker is likened to an automaton. Now we all know that this view is incorrect. It simply cannot be the case that rules themselves, however precisely defined, generate human decisions. At the very least, the person

13. Dworkin originated the contemporary philosophical critique of discretion with his classic essay, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14 (1977). The strong connection between the theory of right and the rejection of pervasive discretion in adjudication did not emerge until later. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1067-78 (1975), reprinted in R. DWORKIN, *supra*, at 81, 90-100.

14. As Kent Greenawalt has argued, a rule requiring the selection of the "five most experienced dogs" for patrol would not permit discretion in the selection of the dogs, but it would be incorrect to say that the dogs had a right to be selected." Discussion with Kent Greenawalt, Professor of Law, Columbia University (1984). It would seem, in addition, that any precisely defined rule would arguably eliminate discretion, but it would not necessarily confer rights on anyone. See Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 371 n.36 (1975).

15. Dworkin, *The Model of Rules*, *supra* note 13, at 32-33, reprinted in R. DWORKIN, *supra* note 13, at 31-32.

16. *Id.* at 32, reprinted in R. DWORKIN, *supra* note 13, at 31 ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.").

17. *Cf. id.* at 16, reprinted in R. DWORKIN, *supra* note 13, at 15 (using the term "mechanical jurisprudence"); J. FRANK, *LAW AND THE MODERN MIND* 118-47 (1930). The title of chapter VIII of Frank's book, *id.* at 118-147, refers to "Mechanistic Law."

18. C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 159 (T. Nugent trans. 1949 & reprint 1959) ("The national judges are not more than the mouth that pronounces the words of the law").

making the decision must regard the rule as binding upon him and must will the decision that seems indicated by the supposedly precise rule. The speed limit, by itself, does not keep drivers from speeding. It is hard to imagine how anyone could think otherwise.

It is fair to say that we do not have an adequate theory of the way in which people—citizens and police officers, as well as judges—make decisions under the law. We can identify two extreme forms of theoretical response to the quandary. The extreme objective theory, if anyone ever held it, would treat the decisionmaker as an impersonal, noncontributing agent of the law. The extreme subjective theory, which some people have asserted as an antidote to mechanical jurisprudence, would treat the judge rather as an autonomous decisionmaker, fully sovereign over all of his choices. On the subjective view, the objective materials of the law appear, in Llewellyn's phrase, as "pretty playthings,"¹⁹ subject to infinite manipulation. One thing we can say rather safely: the truth lies someplace in between. A correct account of decision-making under the law would take into consideration both the objective materials of the law as they influence and guide the decision and the subjective, creative contribution of the decisionmaker.

The appeal of words like "discretion," "choice," and "creative" is that they represent a way of describing the personal input of the decisionmaker. Emphasizing this personal input was a required stage in our intellectual evolution. We should be mindful, however, that lumping together these diverse cases and senses of discretion distorts and debases our arsenal of jurisprudential distinctions.

IV

HOW OTHERS SPEAK ABOUT DISCRETION: K.C. DAVIS

Kenneth C. Davis has probably written more about discretion than anyone else writing in English:²⁰ His prodigious work has undoubtedly influenced the way large numbers of people think about prosecutorial and police discretion. Although a lawyer, Davis's usage has little in common with the way courts speak about discretion and abuse of discretion. Davis begins his analysis with the following stipulated definition of discretion: "An administrator has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."²¹ Starting with his definition, Davis devotes most of his thinking to the problems of "confining, checking, and structuring" what he calls "unnecessary discretionary power." Let us leave aside Davis's normative claims about unnecessary or undesirable discretion. We have enough work simply in penetrating and

19. K. LLEWELLYN, *THE BRAMBLE BUSH* 14 (1930).

20. See, e.g., 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 8:1-9:22 (2d ed. 1979) [hereinafter cited as *ADMINISTRATIVE LAW TREATISE*]; K. DAVIS, *DISCRETIONARY JUSTICE* (1969) [hereinafter cited as *DISCRETIONARY JUSTICE*].

21. 2 *ADMINISTRATIVE LAW TREATISE*, *supra* note 20, § 8:3; The same definition, broadened to include all "public officers," is found in *DISCRETIONARY JUSTICE*, *supra* note 20, at 4.

understanding the mysterious way in which he talks about discretion as administrative power.

First we should note that Davis obviously does not mean to ascribe to discretionary power the quality of wisdom or discernment. Discretion, as he sees it, is a form of power. Yet he does not have in mind the point of those legal realists who stressed the inevitability of personal input in every decision made under legal rules.²² So far as discretion is inherent and inescapable in every legal decision, Davis's conception of rule and discretion could only appear naive. Apparently, Davis believes that some rules can totally displace discretionary input on the part of the decisionmaker. These are what he calls "governing" as opposed to "guiding" rules.²³ His treatise, however, never seems to come forth with a plausible example of a governing rule. It does give us this implausible example of a rule that would supposedly displace prosecutorial discretion: "You are forbidden to prosecute interstate car thefts unless you have reason to believe that organized crime is involved."²⁴ Davis claims that this rule "cuts off discretion"²⁵ to prosecute, unless the case involves organized crime. That, of course, is not what the rule says. The rule is addressed to cases in which a prosecutor has "reason to believe" that certain circumstances exist. Whether a prosecutor has "reason to believe" or not surely depends on his or her personal input in assessing the facts. Realists would have no difficulty seeing these determinations of "reason to believe" as paradigmatic instances of discretion. Even under Davis's own definition of discretion, a prosecutor surely has "a choice among possible courses of action." If so inclined, a prosecutor can find in the facts "a reason to believe" that organized crime is involved in the case. Even a prosecutor who has no "reason to believe" can say that he does. If there is no effective limit on the power to dissemble a "reason to believe," then the prosecutor has full discretion in Davis's sense.

Davis's lapidary definition repays meditation. It is worth noting that the definition is directed to the discretion that administrators have. Apparently, Davis also believes that the same definition applies in ascribing discretion to judges and their decisions. The definition focuses on the power to make a choice and "effective limits" on the exercise of that power. Presumably the same definition would apply to individuals making decisions about whether they should obey the law. Suppose a driver on a deserted highway can, without detection, exceed the speed limit by twenty-five miles per hour. The driver has an effective power to make a choice among possible courses of action: he can drive at various speeds in excess of the speed limit. It would follow that he has discretion about the extent to which he is going to conform to the legal speed limit. Davis himself concedes that "discretion is not limited

22. See, e.g., J. FRANK, *supra* note 17, at 148 ("All judges exercise discretion, individualize abstract rules, make law").

23. 2 ADMINISTRATIVE LAW TREATISE, *supra* note 20, § 8:7, at 184 (2d. ed. 1979).

24. *Id.*

25. *Id.*

to what is authorized or what is legal.”²⁶ He would apparently have no objection to saying that those who can violate the law with impunity exercise discretion in deciding whether to submit. Unreviewable and unsupervised decisions are by their nature discretionary. Juries exercise discretion in all cases in which their verdicts are not subject to being quashed.

There is a conceptual problem that lurks behind this curious, fourth sense of discretion. Is the critical factor in determining the discretionary nature of the decision the expectations of the decisionmaker at the moment of decision, or the events that transpire after the decision? Suppose that contrary to the driver's expectations, a police officer, hiding behind a tree, stops the speeding driver and gives him a ticket. Does it follow that at the time of deciding to exceed the speed limit, the driver did not have discretion? Does the subsequent sanction undercut and change the nature of his decisional flexibility?

The same problem vitiates any effort to say that jury decisions are discretionary. So long as judges have the power to dismiss a case after verdict on the ground that it should never have gone to the jury, or in civil cases, to grant judgment for the plaintiff notwithstanding the verdict, the jury's decision is potentially subject to judicial supervision. Similarly, decisions by the Supreme Court can be overturned by constitutional amendment. However infrequently the amendment process is invoked, it cannot be said that the Supreme Court exercises unreviewable power to decide any way that it likes. If *Roe v. Wade*²⁷ is someday overturned by constitutional amendment, would it follow *nunc pro tunc* that the court did not have discretion in 1973 when it rendered the decision? I am not sure that those who would like to follow Davis's usage could find a way out of this conundrum. Surely the nature of the decision at the time that it is rendered cannot depend upon subsequent events, such as whether a constitutional amendment is passed. Yet it would be equally difficult to let the nature of the decision turn on the decisionmaker's expectations about his potential freedom from review and supervision. If the expectation of not being reviewed were the decisive factor, it would follow that ignorant, unsuspecting administrators and judges would have discretion, while those who anticipated intervention by a higher authority would not. The nature of the decision can hardly turn on the intelligence and the expectations of the person rendering the decision.

Whether Davis's usage is coherent or not, I suspect that it has had an enormous impact on the way observers of the criminal process think and describe what they see. This fourth sense of the concept interweaves with the other three in rendering discussion of discretionary processes virtually incomprehensible. Recalling the analysis to this point, note the four different senses in which the concept is used: (1) discretion as wisdom; (2) discretion as managerial authority; (3) discretion as personal input; (4) discretion as power. Neither the analysis by Goldstein and Marcus of discretion in continental legal

26. *Id.* § 8:2, at 163 (The sentence continues: “but includes all that is within the *effective* limits on the administrator's power” (emphasis in original)).

27. 410 U.S. 113 (1973).

systems nor Uviller's reports on discussions about discretion with the police ever clearly conveys which sense of discretion they have in mind.

V

CONFUSION AND REDUCTIONISM IN DISCUSSIONS OF DISCRETION

So far we have isolated at least four distinct senses in which lay people, lawyers, and observers of the legal process talk about discretion. It would be a mistake to think that these four senses are somehow inherent in the nature of the subject matter. The diverse criteria for ascribing discretion respond to the diversity of our motivations in adapting the language to our purposes. The notion of discretion as wisdom harks back to the origin of the English language.²⁸ The notion of discretion as authority granted over a particular realm also, apparently, has deep roots.²⁹ It is fair to say, however, that the third and fourth senses of the concept, as outlined above, are relatively recent developments. The accuracy of this claim could be easily checked by opening any nineteenth century lawbook. It is highly unlikely that one could find a nineteenth century writer discussing the discretion inherent in interpreting statutes or the discretion that invariably arises when decisionmakers can get away with particular decisions. These usages reflect distortions of our language in the effort to underscore aspects of decisionmaking that have gone unappreciated.

As discussed above, the effort to stress the personal input of decisionmakers represents a sensible way of counteracting the naive view that legal rules entail, in some mechanical way, particular decisions. It is not clear, however, that the word "discretion" need be used in order to make this point. There is a host of other words such as "judgment," "interpretation," and "personal understanding," any of which could be invoked to stress the input of the person, whether judge or citizen, who must mold and apply the rule to a set of facts.

Davis's forced twist on the concept of discretion seems to derive from another strand in the realist approach toward law. Viewed as a general movement, the realists, such as Frank and Llewellyn, are concerned not only about stressing the personal input of decisionmakers, but also about the importance of predicting official behavior in legal practice. The latter perspective was captured by Holmes's conception of the bad man's approach to lawyering: what the bad man wants to know is how officials in power are going to impinge on him.³⁰ This predictive orientation toward the law stresses the power of officials to act in ways that matter to us. What we want to know, both

28. 3 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 435 (1897) (definition (2) equates discretion with "judgement[,] decision, discrimination" and cites 14th century sources).

29. *Id.* (definition (4) equates discretion with "uncontrolled power of disposal" and cites to 14th and 15th century sources).

30. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

as citizens and as lawyers is how to predict and then, of course, how to influence the pattern of official decisionmaking.

Davis's perspective on administrative decisionmaking reflects this external perspective on official power. The legal official is thought of as an organism that might act in either predictable or unpredictable ways. He is not considered as a subject who stands with us in a relationship of interpersonal communication, persuasion, and criticism. What we citizens want to know is how this official organism is going to act. Rules have the virtue, according to Davis, of specifying the way the decisional organism will act in the future. Discretionary decisions are bad because the organism is left free to wander aimlessly in a wide channel of possible decisions.

The external perspective has some support in the positivist legal tradition. H.L.A. Hart coined the phrase "external point of view" in order to highlight the inadequacies of thinking of law exclusively as the command of the sovereign.³¹ The notion of law as command excludes the function of legal rules as standards in the process of intersubjective criticism and vindication. The early positivists, beginning with Hobbes in the seventeenth century, stressed the external perspective.³² This orientation is carried forward in Holmes's predictive theory,³³ which equally ignores the significance of legal rules and standards in the discourse of criticism, blame, vindication, and legitimation. Davis stands in this positivist tradition. He adopts Holmes's predictive theory and therefore stresses the maneuverability of the decisionmaker as an organism that is either controlled or free to act erratically.

Davis's external perspective contributes to the distortion of our conceptual tools. We now have a situation in which people are trying to communicate with each other about the legal process, but some of them talk about discretion as inevitable and others think of discretion as derived solely from the absence of "governing rules." The problem is complicated, further, by the intrusion of technical references to discretion as managerial authority. For example, Davis discusses a decision by the Second Circuit, *Fook Hong Mak v. Immigration & Naturalization Service*,³⁴ in which the court supposedly addressed itself to the question whether "rules may preclude discretion."³⁵ A statute granted discretion to the Attorney General to adjust the status of lawfully admitted aliens and to admit them as permanent residents. The I.N.S., acting under this grant of discretion, adopted a regulation excluding aliens in-transit without a visa from consideration for this adjustment of status. The plaintiff sued on the ground that this wholesale exclusion of the whole category of aliens violated the agency's obligation to exercise discretion in every case. The court upheld the rule, excluding aliens from consideration. It is possible to describe this case as one in which a "rule precludes discretion," yet this

31. H. HART, *THE CONCEPT OF LAW* 86-88 (1961).

32. For an engaging presentation of Hobbes's views, see T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropsey ed. 1971).

33. See *supra* note 30 and accompanying text.

34. 435 F.2d 728 (2d Cir. 1970).

35. 2 ADMINISTRATIVE LAW TREATISE, *supra* note 23, § 8:8, at 192.

example of the relation between rules and discretion has nothing to do with Davis's claim that a governing rule "cuts off" discretion.³⁶ First, the rule in this case is a negative one that excludes a category of aliens from consideration.³⁷ Second, the notion of discretion involved is closer to the second sense, namely managerial authority, than any of the other three senses mentioned above. It is only the breakdown of our capacity to appreciate distinctions that would lead a writer to use this case as an illustration of the conceptual relationship between rules and discretion.

There can only be infelicitous consequences of interweaving four or more senses of discretion. It proves to be remarkably easy to make a claim about discretion in one sense and then to shift, quietly and perhaps unwittingly, to a parallel claim about discretion in a totally distinct sense. Blurring relevant distinctions in this way is properly called "reductionist:" the entire range and diversity of decisional possibilities is reduced to one repetitive description.

The reductionist tendencies of contemporary thinking are readily illustrated. Consider the obvious differences between the Supreme Court's decisions on petitions of certiorari and its decisions on matters of substantive law. Observers of the legal process who think like Goldstein, Marcus, and perhaps Uviller, would describe both types of decision as discretionary. The first sense of discretion, namely as wisdom, does not apply; whatever the sense in which these decisions presuppose discretion, it is not always true that they reflect wisdom and good judgment. Discretion as managerial authority is present only in the case of certiorari decisions,³⁸ not in the case of decisions by the Supreme Court interpreting the Constitution and determining the rights of litigants. Lawyers typically treat the certiorari process as discretionary in the technical sense. Only sophisticated observers, influenced by the realist tradition, would refer to Supreme Court decisionmaking as discretionary.

Discretion in the third sense, namely as personal input, is present in these cases as in all cases of decisionmaking. Discretion in the fourth sense, namely as the power to get away with alternative decisions, applies in both contexts as well. It is only in the technical discourse of lawyers, as it turns out, that we are able to pick up any sense of a distinction between these obviously distinguishable decisional contexts. In the other three senses of discretion, the two types of decision collapse into one. This blending of obvious diversity under a single term reflects an unfortunate tendency toward reductionist thinking.

Consider also the following historical example which would undoubtedly generate confusion in the discourse of contemporary observers. We are

36. See *supra* text accompanying note 25.

37. This claim strikes a rich jurisprudential vein. A negative rule precludes certain claims; a positive, "governing" rule, see *supra* text accompanying notes 24-25, would dictate a particular result. The negative rule leaves open alternative remedies; the positive rule resolves the dispute. If negative rules eliminated "discretionary" (or any other) consideration of a class of case, it does not follow that positive rules yield results without a discretionary input, in some sense, by the decisionmaker. These issues require further discussion.

38. SUP. CT. R. 17.1 ("A review on writ of certiorari is not a matter of right, but of judicial discretion"). What could the rule imply by this reference except discretion as "managerial authority"?

inclined to think today that the President exercises his veto powers as a matter of discretion. This is the way, I assume, that Goldstein, Marcus, and Davis would describe the matter (for Davis, however, there would be a problem if the Congress, by a two-thirds vote, overruled the presidential veto). Suppose, however, that as some early constitutionalists argued, the President could exercise this power only to protect the Constitution. He would not be entitled to override the legislative will on the grounds of "expediency."³⁹ In the reductionists' analysis of discretion and decisionmaking, the significant difference between constitutionality and expediency as grounds for a decision would disappear. In both cases, personal input would still be inevitable; the likelihood of "getting away" with alternative decisions would presumably be the same. Yet there clearly is a difference. This difference emerges only when we limit discretion to the second sense employed by lawyers. In making judgments of political expediency, the President may enjoy a range of decision-making autonomy that would properly be called discretionary. But in making a good faith assessment of the constitutionality of a particular piece of legislation, the President would have no more discretion than has the Supreme Court in its exercise of judicial review.

Prosecutors make a variety of decisions: (1) they allocate resources as part of a judgment to concentrate on certain forms of crime; (2) they interpret legal materials and make predictions about the circumstances under which courts will convict; (3) they assess circumstantial evidence and the persuasiveness of witnesses in particular cases; and (4) they reduce charges or grant immunity to particular defendants in order to secure better cooperation or testimony in the prosecution of other suspects. Does it follow from the erosion of our language that each and every one of these decisions is discretionary?

The decision to allocate resources represents an exercise of managerial discretion, much in the same sense that grants of certiorari represent managerial judgments in shaping the workload of the Court. These allocative decisions do not require an assessment of the rights of the competing parties. In contrast, interpreting legal material and assessing evidence reflect discretion only in the third and fourth "sophisticated" sense. They may require discretion in the first, traditional sense, but they obviously do not always reflect this required discernment.

The fourth category, reducing charges and granting immunity, reveals the greatest potential for controversy. Generation of different conceptions of the criminal process depends upon whether these decisions are labeled discretionary. The use of the term "discretionary" here is intended in the second, technical sense. If these decisions are discretionary, as they are routinely described in American law, an image emerges of the criminal process as an enterprise designed to maximize convictions over a large range of potential defendants. We stress the prosecutor's role as manager of scarce resources:

39. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 338 (1948).

He may have to trim in one case in order to gain in another. Sound managerial judgment on his part requires that he forego some convictions in the present order to maximize this impact in the future.

Consider the implications of denying discretion (in the technical sense of managerial authority) in making prosecutorial decisions. The prosecution would not be allowed to compromise in one case for the sake of future gain. Prosecutors would be obligated to do justice, to prosecute to the full extent possible, in every case. They would not be permitted to think of running their office as a system of prosecutions but as a collection of distinct and discrete prosecutions, each assessed on its own terms. This is what Europeans must have in mind in speaking of the legality as opposed to the opportunity principle.⁴⁰ They mean to deny discretion in reducing charges or granting immunity to particular defendants in order to maximize the overall output of their office. Of course, they recognize that the exercise of prosecutorial functions requires judgment about the allocation of resources, interpretation of legal materials, and evaluation of the evidence. The role of judgment and discernment in these matters (discretion in the first sense) is incontrovertible. It is another matter, however, to recognize discretion over charging as an expression of managerial authority. So far as legal theorists are committed to the principle of legality, they mean only that it is or ought to be regarded as improper to engage in the expedient balancing of one case against another in order to maximize the output of the entire prosecutorial system.

It is unfortunate that in their study of continental criminal procedure Goldstein and Marcus could never quite grasp this ideological aspect of the debate about the legality and opportunity principles. They seemed to have approached the evidence as captives of their own conceptual framework—a framework that rendered it virtually impossible for them to perceive distinctions in the varieties of discretion. Their argument seems to be that since discretion is inevitable in the third and possibly fourth sense, there is no plausible way of talking about banishing discretion from the criminal process.⁴¹ Therefore, they label efforts to express a commitment to the principle of legality as self-deceptive. It is possible that the prevailing reductionist thinking about discretion renders observers of the European criminal process virtually incapable of appreciating the way in which the questions of discretion and legality function in the minds of those they seek to observe.

VI

ON CAPTURING RELEVANT DISTINCTIONS: DISCRETION AND PREROGATIVE

The preceding remarks are informed by the assumption that if we rid ourselves of the third and fourth “sophisticated” senses of discretion, we will

40. See K. SCHAEFER, *STRAFPROZESSRECHT* 231 (1976); Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.*, 480, 503-04 (1975).

41. See Goldstein & Marcus, *supra* note 1, at 280-83.

make some progress in appreciating relevant distinctions in the criminal process. We will avoid the reductionism of thinking that all decisions requiring personal input or that are immune from higher control are necessarily the same. In order to cultivate these distinctions, we must remain closed to the ordinary language of lawyers and lay people.

If we stick to ordinary language as the source of our authority, we shall come to appreciate the naiveté of Davis's distinction between rule and discretion. From his dualistic point of view, every decision involving choice is discretionary. It follows that congressional decisions to legislate are discretionary, presidential decisions to pardon are discretionary, and even a presidential nomination of a particular lawyer for the Supreme Court would be discretionary. By encompassing everything not governed by rule, Davis lumps together, under the rubric of discretion, distinct categories of decisionmaking.

As a matter of ordinary language we distinguish between discretionary decisions and matters of prerogative. Unless our usage is corrupted by the realist influence, it should seem odd to describe legislation, presidential pardons, and Supreme Court nominations as discretionary.⁴² It is more appropriate to describe them as matters of prerogative. They seem, at the very least, to be decisions different from those in the range of managerial judgments made in managing a trial or the case load of the Supreme Court. There is no specific institution to be managed by legislating, pardoning, or choosing a particular person as a Supreme Court Justice. These decisions are free choices in a way in that discretionary decisions are not.

How should we get at the distinction between discretionary decisions and matters of prerogative? Let me suggest one possible basis for understanding the patterns of our usage. It seems that in cases of discretionary decisionmaking, we sense the possibility of doing things in a more legalistic, rule-bound way. We describe sentencing as discretionary because we sense that it is possible to have a system of determinant sentencing. We describe the certiorari process as discretionary because it would be possible, by a set of rules, to determine the kinds of cases that would be heard as a matter of right. There is, therefore, a contingent quality to discretionary decisions. There is in the background a sense of a higher authority's approving and tolerating the discretion. It is as though the rules are waiting in the wings, ready, if the director should change the script, to come centerstage. This does not seem to be the case with matters of prerogative. No one could lay down a set of rules to tell Congress how to legislate. No one could specify, conclusively, the standard for presidential mercy. No one could specify a determinative set for criteria for selecting Supreme Court nominees. These are matters that are intrinsically free of regulation. There is nothing contingent about the decisionmaker's freedom of choice.

42. Dworkin's essay anticipates this point. See Dworkin, *supra* note 13, at 32 ("[Y]ou would not say that I either do or do not have discretion to choose a house for my family").

I would not want to exaggerate the sharpness of this suggested distinction between discretion and prerogative. There are some clear examples of each category. In other situations it may be difficult to classify the decisional authority one way or the other. Perhaps the adjustment of alien status by the I.N.S.⁴³ is more a matter of prerogative than of discretion. Perhaps the nomination of Supreme Court Justices should be viewed as a managerial decision, analogous to paradigmatic cases of discretion. It seems that more work is necessary to develop an adequate map of decisional possibilities.

VII

ON RECAPTURING RELEVANT DISTINCTIONS: THE INTERNAL POINT OF VIEW

So long as we are concerned only about what legal officials are likely to do to affect our interests, we miss a number of very important distinctions. We distort the legal process by blurring the difference between adjudication and following orders. It is true that Davis stresses the importance of requiring administrators to give reasons for their decisions as a technique for "structuring" discretion.⁴⁴ One senses, however, that his primary concern is exploiting these reasons in order better to predict how the administrator will behave in the future.⁴⁵

One of H.L.A. Hart's great contributions to jurisprudence was to bring back into focus the importance of legal discourse as a characteristic of the legal system.⁴⁶ This discourse consists of invoking rules, standards, principles, statutes, and precedents in the ongoing process of criticism, blame, vindication, and justification. This mode of discourse defines the legal culture—a culture that is distinguishable from one defined by discourse relying upon terms of love, appeals to God's will, bribery, threats of physical violence, and other, "nonlegal" conversational gambits. There are many contexts in which it is appropriate to say, "It is better to give than to receive," but the discourse of legal rights and obligations does not appear to be one of them. It seems novel to stress the element of discourse in understanding the life of the legal system. We shape and are shaped by this discourse in every day of our legal life. It is only our preoccupation with power that could possibly make the external point of view, Holmes's predictive theory of law, the slightest bit appealing.

If we focus now on the discourse of the legal culture, one of the first questions we should pose is: when is it appropriate for a decisionmaker to refer to his or her own discretion in offering a justification for a decision? In some discretionary contexts, such as granting or denying petitions for certiorari, no reasons need be given. Let us suppose, however, that we are in a world in which any party can demand an explanation from the person who has ren-

43. See *supra* notes 34-37 and accompanying text.

44. See 2 ADMINISTRATIVE LAW TREATISE, *supra*, note 20, § 8:4, at 169-71.

45. *Id.* at 169 (structuring discretion as a means of control over decisionmakers).

46. See H. HART, *supra* note 31.

dered a decision affecting his interests. When is it permissible for a decisionmaker to fall back on his own discretion as an explanation for his decision? Consider the problem of justifying the granting of a continuance in a system in which the judge has discretion to manage the calendar. The litigant affected challenges the judge's decision. At the outset of their exchange, the judge might say, "I am granting this continuance because it seems to be more convenient to everyone to wait until after the summer vacation." When pressed by the party who wants to begin sooner, the judge could permissibly refer more specifically to her own interests, to a crowded court calendar or to the conflicting interests of opposing counsel. There will come a point, however, when these reasons run out and it would be permissible for the judge to say, "I have looked at all the considerations and, in my best judgment, it is better to postpone the trial." Referring to her "own best judgment" or to her official discretion does not constitute a reason for the decision. It is a way of backing out of the obligation to present a convincing reason. It is important to realize that according to the ethos of the legal culture, there are only certain contexts in which it is permissible to back out of the discourse by referring to one's own discretion or one's "own best judgment."

A court seeking to justify its decision on a matter of substantive law could not invoke its supposed discretion as a way of backing out of its obligation to write a convincing rationale for the decision. It would simply not do, according to our present expectations of the judicial process, for a judge to write, "In my best judgment, the plaintiff simply does not have a right to recover." The first obligation of the opinion writer is to present convincing arguments based upon the legal materials as mastered and molded to the particular problem posed in the case. The argument must be directed to the external considerations that legitimate the decision. The judge cannot permissibly turn inward and seek to legitimate the decision by referring to her own good judgment. Invoking discretion would be even worse. Of course, one could imagine a legal culture in which self-reference functioned as a means of legitimation, but that is not the legal culture in which we live and argue.

What is it about legal decisions that precludes a self-referring appeal to one's own judgment and subjective input in the decisionmaking process? The best way to understand this feature of legal discourse is to turn to techniques of criticism and justification in arenas outside of the law. Take, for example, the present controversy about whether Julius Rosenberg was in fact guilty of espionage. There are conflicting interpretations of the evidence. Let us suppose that in a debate on the issue, one of the protagonists said, "I have looked at all the evidence and in my discretion, I have decided that Rosenberg was not guilty." This conversational move would obviously be laughable. The reason, presumably, is that we treat historians as though they have an obligation to determine the truth of the matter they are studying. In order to justify their claims of truth, they must limit their arguments to the evidence bearing on the matter at issue. Even if a sophisticated observer of historical inquiry

would say that every historian injects his own personal views into his assessment of the evidence, the historian, as a participant in the discourse of history, cannot invoke these subjective considerations as an argument on behalf of his position.

The same point applies to legal discourse. In discussing rights and obligations under the law, we have to keep our focus on the law itself. We treat judges, as we do historians, as participants in an inquiry about the truth. They must rest their claims of legitimation on an assessment of the legal materials as they apply to the facts. Now we need not decide whether there is a "truth" about the law—a right answer, as Dworkin claims—any more than we need decide whether historical truth exists in any determinable sense. If we are to give an account of discourse, however, both in law and in history, we have to attribute to the participants in this discourse a commitment to justify their decisions on the basis of there being a truth of the matter.

The next step in this inquiry would be to probe behind our conversational practices and ask why we do not tolerate self-referring arguments in historical and legal discourse. There are two possible explanations. The first is that we really believe there is a truth of the matter, in which case it seems sensible to demand of all participants in the discourse that they share this belief. An alternative explanation might be that we wish to avoid conversational gambits that bring the process of criticism and justification to a halt. Self-referring arguments, invocations of one's own good judgment or discretion, stop the debate. There is nothing to say in reply to someone who seeks to justify his decision on the basis of his own good judgment or discretion. If we believe that never-ending discourse, challenge and response, brings us closer to justice and truth in the law, then we must structure discourse so that all participants in it appeal exclusively to external data of fact and law.

If we apply these reflections to the problems of prosecutorial discretion, we find that there are only selected instances in which prosecutors may refer to their discretion as a way of avoiding a response based upon the facts. If a member of a grand jury asks the prosecutor why he has concluded that the defendant acted negligently in firing a revolver, the prosecutor can hardly defend his position by invoking his supposed discretion. Yet in a case in which the prosecution dismisses charges in order to secure the testimony of one co-conspirator, the prosecution might well refer to his discretionary authority as a way of legitimating this windfall to the cooperative defendant.

The interchange between Uviller and his police officer now comes into sharper focus. Uviller's claim that the officer had discretion to reject the witness's testimony was an observation from the external point of view. He was saying to the officer, "Look, you have more autonomy in this matter than you realize." Yet it could not be said that Uviller was teaching the officer how he could justify his decision to a superior in the police force. If the supervisor asked him why he failed to make an arrest in a particular case, the officer could hardly say, "It was my discretion not to believe the witness." There may well be situations, however, in which police officers, like prosecutors, could rely

upon an alleged discretion not to enforce the law as a way of terminating challenges to particular decisions. Whether we regard this discretionary authority as legitimate is another question.